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February 14, 2003

BY FACSIMILE AND U.S. MAIL

Mr. Mike Ribordy
United States Environmental Protection Agency
Region 5
77 West Jackson Blvd., SR-6J
Chicago, IL 60604-3590

Re: Response of The Pillsbury Company to the September 30, 2002 §106 Order for the Sauget Area 2 Superfund Site, Sauget, Cahokia and East St, Louis, Illinois.
Our File No. 56977-43

Dear Mr. Ribordy:

On behalf of our client, The Pillsbury Company ("Pillsbury" or "Company"), we are writing to notify USEPA that Pillsbury has a good faith defense to the United States Environmental Protection Agency's (USEPA's) September 30, 2002 Administrative Order (the "UAO" or "Order") issued in connection with the Sauget Area 2 Superfund Site (the "Site"). The Order requires implementation of an interim groundwater remedy at Site R (the "Remedy"). Paragraph 40 of the Order requires each respondent to comply with all provisions of the Order. Paragraph 99 requires each respondent to submit a written notice of intent to comply with the Order. Paragraph 34 states that each Respondent is a "liable party" as defined in Section 107(a) of CERCLA, 42 U.S.C. § 9607(a). Pillsbury does not agree that it is a liable party.

Pillsbury leased a piece of land that was south and cross gradient of the property addressed by the Remedy. Pillsbury made no contribution to the contamination, and the Remedy does not relate to the property leased by Pillsbury. Additionally, Pillsbury has never owned, operated or arranged for transportation of any substances to the areas affecting the Remedy. Pillsbury thus has no association with the Remedy such that it could become liable for it under CERCLA. Pillsbury therefore submits this good faith defense letter without waiving, and specifically reserving, all issues and defenses available to it.

Due to the unique circumstances and history of the Sauget Area 2 Site, Pillsbury participated in the opportunity to confer conference, and participated in the joint request for an extension of the UAO paragraph 99 deadline. As USEPA has acknowledged, the only practical means by which Pillsbury can comply with the UAO would be to reach an agreement with Solutia Inc. ("Solutia") to participate in its compliance. Despite substantial efforts to negotiate with Solutia, however, Pillsbury's good faith efforts to reach such an agreement have not been successful. As USEPA is aware, Pillsbury, in conjunction with a group of other UAO recipients, has been engaged over the last several months in extensive discussions with Solutia with regard to compliance participation. This group has engaged in good faith negotiation culminating twice in significant joint offers to Solutia for participation, dated December 19, 2002, and February 5, 2003. Unfortunately, the group's efforts to reach an accord with Solutia have been unsuccessful.

I. SUMMARY

As discussed at length below and in our letter dated January 16, 1998, Pillsbury does not believe that USEPA has any basis under CERCLA to hold it liable for the Remedy. The property Pillsbury leased has nothing to do with this Remedy, and could not have impacted the contamination that the Remedy addresses in any way. The Remedy, as discussed in the UAO, addresses "groundwater contamination releasing to the Mississippi River adjacent to Site R, and the resulting impact area." The UAO states that the impact area is "confined to an area approximately 2,000 feet long (coinciding with the northern and southern boundaries of Site R) and approximately 300 feet from Shore. The River flows from the north to the south, and the property leased by Pillsbury is south of the Remedy.

The UAO discusses Site R, a landfill owned and operated by Monsanto as a facility that is "located upgradient of the OU and the observed releases of groundwater to the Mississippi River." Pillsbury leased the south central portion of Site Q well south of Site R, starting in 1979 (long after Site Q was closed), property not involved with the Remedy, and not discussed in the UAO as having a potential to impact the Remedy. The UAO specifically limits the involvement of Site Q to the northern end. Pillsbury has never had a relationship with Monsanto, and certainly exercised no control over Monsanto's actions at Site R. Additionally, Pillsbury has never arranged for disposal anywhere at the Site. Pillsbury has therefore not owned, operated, or transported any waste to the Site R, and can not be held liable as an owner, operator or transporter for the contamination found at Site R. Pillsbury can not be held liable for a Remedy involving a property with which Pillsbury does not currently have, and has not previously had, any relationship.

II. FACTS

The business conducted by Pillsbury in Sauget, Illinois, for which the EPA seeks to hold the Company liable, was a grain and commodity transferring operation. From June 30, 1979 until 1988, Pillsbury leased approximately 84 acres of property on the East Bank of the Mississippi River at Sauget ("the leased property" or "the property"). See Exhibit A. This property is in the south central portion of Site Q, in an area that is downstream from the Remedy, and that is not discussed in the UAO as having a potential to affect the remedy. The owner of the leased property was the Riverport Terminal and Fleeting Company. Pillsbury maintained facilities at the property for the unloading, loading and temporary storage of grain and other commodities, which were transported on railroad cars, trucks and river barges. In 1988, Pillsbury transferred its interest in the leased premises to ConAgra Company. Pillsbury has therefore never owned, and does not currently operate on, the land that is part of the south central portion of Site Q, or any other land related to this Remedy.

In conjunction with its activities at the leased property, Pillsbury made arrangements with a contractor to lay railroad track at the facility. The track, when completed, would have been used to facilitate the transfer of commodities. As the process of laying track requires some excavation in order to lay ballast, the contractors were operating heavy machinery on the property during the week of May 26, 1980. According to an unsubstantiated story, discovered upon investigation when allegations related to contamination at the Monsanto landfill arose, a contractor operating a bulldozer reportedly ruptured a "buried barrel" containing a substance with an "obnoxious odor." Pillsbury has not been able to substantiate this story or locate any tests or samples that indicate what the contents of this alleged barrel might be.

USEPA has not supplied any information to indicate that it has additional knowledge concerning the barrel or its contents that would support any assertion that the barrel, if it existed, contained hazardous substances. EPA can not argue that the contents of a single barrel, located in the area south of and cross gradient from the land affected by the Remedy, even if it existed and contained hazardous substances, could have caused the contamination addressed by the Remedy.

III. ANY "RELEASE" WAS GEOGRAPHICALLY UNRELATED TO THE REMEDY

The property Pillsbury leased is located south of the Remedy. At the opportunity to confer meeting concerning the UAO, USEPA officials stated that parties only having an "ownership interest" south of the Remedy had a good faith defense to the UAO. This statement is logical in light of the groundwater flow near the Site. The groundwater flows east-west, and the river flows north-south. It is therefore impossible for a property south of the Remedy to have contributed to releases necessitating the Remedy. USEPA further stated that it only had information concerning who the "owners and operators" of Site Q were, and did not have sufficient information to differentiate which "owners and operators" had an interest only in property south of the "dog leg" portion of Site Q. As

previously mentioned, Pillsbury leased a portion of south central Site Q, well south of the dog leg of Site Q. This area was not discussed in the UAO as having a potential impact on the Remedy, and is not involved with the Remedy. Therefore, even if there was any contamination on the property leased by Pillsbury it could not affect the Remedy. Consequently, Pillsbury has no liability and a good faith defense to the UAO.

IV. EPA CANNOT SHOW THAT PILLSBURY CAUSED THE RELEASE OF A HAZARDOUS SUBSTANCE

Just as significantly, there is no evidence that Pillsbury caused the release of a hazardous substance. Such proof is a necessary precursor to any finding of liability based upon any liability status other than current owner. Memphis Zane May Assoc. v. IBC Manufacturing Co., 952 F.Supp. 541, 546 (W.D.Tenn. 1996) ("As an initial matter, plaintiffs must demonstrate a relationship between the defendant and the release or threatened release of a hazardous substance."). In other words, "the Government must. . . prove that the defendant's hazardous substances were deposited at the site." U.S. v. Alcan Aluminum, 964 F.2d 252, 266 (3rd Cir. 1992).

Here USEPA has no evidence as to the unsubstantiated story that a barrel was ruptured by a contractor. No sample of the supposed substance was ever found, taken or analyzed: neither USEPA nor Pillsbury even has proof as to the existence of the barrel from which the substance would have been released. In short, we simply do not know anything about the composition of any substance that may have been released and can do nothing but hypothesize about its nature.

Such conjecture is insufficient to create liability. As USEPA is aware, "[m]ere speculation that materials contained hazardous substances is not sufficient to establish CERCLA liability." Dana Corp. v. American Standard, Inc., 866 F.Supp. 1481, 1533 (N.D. Ind. 1994). There must be proof, and USEPA has none. As a result, USEPA cannot show that Pillsbury released a hazardous substance, or that Pillsbury is liable.

V. PILLSBURY IS NOT A RESPONSIBLE PARTY FOR THE REMEDY

Pillsbury understands from the UAO, and conversations with the USEPA, that the Remedy is principally related to Site R, and with respect to Site Q, only the dog leg portion is implicated.

A. Pillsbury is not a former owner or operator of the Site

The area of concern for this Remedy is Site R and areas upgradient. Pillsbury leased the south central portion of Site Q, which is therefore unrelated to the Remedy. The Remedy does not impact or run through the portion of Site Q that Pillsbury leased. Exhibit A.

Pillsbury understands from its prior discussions with the Agency that USEPA is proceeding on the theory that Pillsbury was the "operator" of the portion of Site Q it previously leased. This argument has no merit. The courts have not come to a conclusive determination of what constitutes "operation" of a facility, but they have placed certain parameters on the definition. Some courts require "actual control" of the facility, or an active role in the management thereof. See Jacksonville Electric v. Bernuth Corp., 996 F.2d 1107, 1110 (11th Cir. 1993) ("a person is liable as an 'operator' when that person actually supervises the activities of the facility. That is, the person must play an active role in the actual management of the enterprise."). Others require "day-to-day control," Acme Printing Ink Co. v Menard, Inc., 870 F.Supp. 1465, 1484 (E.D.Wis. 1994) ("In order to be an operator under CERCLA, a party must exercise some kind of day-to-day control over operations at the site.") or "substantial control," Landsford-Coaldale Joint Water Authority v. Tonolli Corp., 4 F.3d 1209, 1221 (3rd Cir. 1993) (The court adopts the "actual control standard," in which "a corporation will only be held liable for the environmental violations of another corporation where there is evidence of substantial control exercised by one corporation over the activities of another.").

Nevertheless, despite their inability to agree on a precise definition of "operator," the courts all require some degree of control over the facility's operations. In the case of Pillsbury, the Company had absolutely no control over Site Q. It had no input into decisions about what wastes the landfill would accept, how long it would accept such wastes, from whom it would accept such wastes, what, if anything, it would charge for the wastes, or what standards would be implemented to prevent the release of the wastes. Indeed, the Company does not now, nor has it ever, had any knowledge about these matters, let alone had any control over them.

Pillsbury does not know of any case law that suggests that such minimal activity as that performed by Pillsbury in operating a bulk commodity facility on the leased property, adjacent to and downstream from the area of concern, would constitute Pillsbury's "operation" of Site Q. Indeed, such an argument is so tenuous that Pillsbury does not believe any court would accept it. Pillsbury was simply an operator of a bulk commodity facility on a portion of Site Q at a time well after the landfilling operations on Site Q were completed. This does not make Pillsbury an "operator" for CERCLA purposes.

B. Pillsbury is not a current owner or operator of the property in Sauget Ill.

Pillsbury is not the present owner or operator of land related to, or near the Remedy, having transferred its lessee's interest in that property to ConAgra in 1988.

C. Pillsbury is not a transporter

Pillsbury did not transport any waste to the Site, nor is Pillsbury aware of any allegation that it was a transporter.

D. Pillsbury is not a generator or arranger

Pillsbury is not liable at the Site as a generator or arranger. The Company did not generate any waste; it did not arrange for the disposal of any waste; it did not own or possess the drum that was reported to have ruptured. It has not been able to substantiate the report of a punctured drum, and in any event, evidence indicates that the drum would not have been located on land affected by or impacting the current Remedy.

Plainly, Pillsbury is not a present or former owner or operator of the facility, nor did it transport any waste to the Site, or generate waste which was transported to the Site. As a result, the Company cannot be held liable under CERCLA for costs associated with the UAO.

VI. THE LEGAL STANDARD OF LIABILITY CERCLA

Pillsbury has a good faith defense to the UAO since it is not a "liable party" under CERCLA. In order for USEPA to show that Pillsbury is a "liable party", it must show that Pillsbury falls into one of four categories of responsible persons. As discussed extensively above, USEPA cannot meet its burden in this situation. USEPA cannot show that Pillsbury is an owner, operator at the time of disposal, generator or arranger, or transporter.

VII. CONCLUSION

For ten years Pillsbury leased land located south and cross gradient of the Remedy. Pillsbury did not at that time, or at any time subsequent, have any involvement with land associated with the Remedy. Pillsbury did not cause any releases associated with the Remedy, and Pillsbury has never owned or operated land associated with the Remedy. Pillsbury assumes USEPA issued the UAO to it based on its being a lessee of Site Q, without having analyzed the details of the lease. Having now substantiated that its leasehold interest was well south of the dog leg portion of Site Q, as stated at the opportunity to confer conference, we now assume USEPA agrees Pillsbury has a good faith defense to the UAO. If USEPA has any further relevant information of which Pillsbury is currently unaware that indicates liability at the Site, or if USEPA feels that there is a basis for assigning Pillsbury liability under CERCLA despite the facts discussed in this letter, please contact the undersigned promptly and provide the reasons for USEPA's position.

As previously discussed, Pillsbury has made considerable efforts to reach an agreement with Solutia to participate in UAO compliance despite its lack of involvement with the site or the Remedy. In light of the nature of Pillsbury's involvement with the area, its willingness over the course of several months to commit considerable time, effort, and money to achieve a meeting of the minds with Solutia through the medium of the two joint offers can only be viewed as eminent good faith. In addition, although Pillsbury has been unable to reach a settlement with Solutia to address compliance with

the UAO, the Company is interested in entering into negotiations directly with USEPA to resolve the UAO issues. If USEPA has interest in opening discussions on this subject, please contact the undersigned.

Sincerely,

Gary P. Gengel

Gary P. Gengel

c: William C. Crutcher, III, Esq.
Mr. Dennis J. Vaughn
Mr. William E. Muno